United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Orig w/ affidavit of mailing

76-6149

To be argued by
LEWIS F. TESSER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-6149

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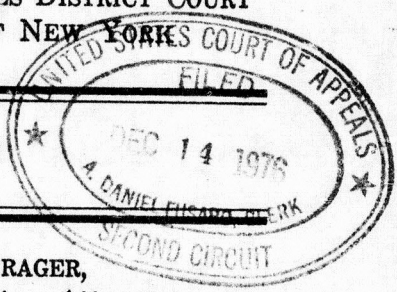
P/S

LUIS M. GRULLON,
Plaintiff-Appellant,

—v.—

HENRY A. KISSINGER, Secretary of State of the United States, JULIO ARIAS, Director of Visa Office in Dept. of State of United States and EVELYN A. WYTHE, Vice Consul of the United States at Santo Domingo, Dominican Republic,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



BRIEF FOR APPELLEE

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York,
225 Cadman Plaza East,
Brooklyn, New York 11201.

BERNARD J. FRIED,
LEWIS F. TESSER,
Assistant United States Attorneys,
Of Counsel.

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Statement of Facts

The plaintiff, Luis M. Grullon, a legal permanent resident of the United States, was born out of wedlock on or about March 10, 1946 to Ramona Torres and Martin Grullon in the Dominican Republic. (A-10, 11, 18, 23).[1] The parents of the plaintiff are not nor ever have been married to each other although the father, approximately two months after Luis's birth, did acknowledge the child pursuant to the provisions of Law 985 of the Dominican

[1] "A" followed by a number or numbers refers to the page or pages of the Appendix.

Republic. (A-10, 11, 18, 23). In connection therewith, Martin Grullon sought to obtain a special immigrant visa and claimed exemption from the labor certificate requirement on the ground that he is the father of a child lawfully admitted to the United States for permanent residence pursuant to Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(14) (1970). An Application for Verification of Lawful Permanent Residence of An Alien was submitted by Luis on behalf of his father to the Immigration and Naturalization Service in 1971. (A-2, 10, 11).

After ascertaining the pertinent facts supporting Martin's application, the American Consul in the Dominican Republic ("Consul") found that Luis was not a child within the meaning of Section 101(b)(1)(C) of the Act. Accordingly, the application for special immigrant visa was denied on February 20, 1974. (A-7, 10, 11).

This instant litigation followed. Plaintiff sought a declaratory judgment to have himself declared the son [child] of Martin Grullon pursuant to Section 101(b)(1)(C) of the Act. Both sides moved for summary judgment and the District Court (Pratt, *J.*) granted the defendants' motion on July 20, 1976.

Issues Presented

Did the District Court have jurisdiction to review the denial of an immigrant visa to plaintiff's father?

ARGUMENT

Consular determinations regarding the issuance of visas are not subject to judicial review.[2]

Although the action in the District Court was couched in terms of declaratory judgment, in substance the plaintiff asked the court to review a consular determination to deny a visa; in seeking relief, plaintiff attacked the grounds upon which denial of nonissuance was made.[3]

It is well settled that consular determinations regarding the issuance of visas are not subject to judicial review because Congress has conferred upon consular officers exclusive authority to pass on application. Section 221 (a) of the Immigration and Nationality Act, 8 U.S.C. § 1201(a) (1970). Furthermore, even the Secretary of

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[2] The appellant has also alleged that 8 U.S.C. §§ 1101(b)(1)(D) and 1101(b)(2) are unconstitutional. In *Fiallo* v. *Levi*, 406 F. Supp. 162 (E.D.N.Y. 1975), a three-judge district court held the statute constitutional. On June 7, 1976, the Supreme Court of the United States noted probable jurisdiction. The appellant has requested in his Brief (Point I) that this court's decision be stayed. The government respectfully submits the appellant's request be denied as a matter of judicial discretion.

[3] In the Memorandum and Order below, Judge Pratt concluded:

> I cannot agree with plaintiff that the action here can be maintained under a theory of preliminary declaration of immigrant status. In the first place, the complaint alleges denial of the visa to Martin, and a copy of the denial was annexed to the complaint. The prayer for relief seeks a declaration that the consul's determination of legitimacy was erroneous, or that the legitimacy standard is unconstitutional. In addition, plaintiff, in effect, demands a judgment directing issuance of the visa. In short, although the action has been brought by the resident son, its purpose and intent clearly and solely is to compel issuance of a visa to the non-resident father (A-27).

State is without authority to control determinations of consular officers with respect to decisions relating to the granting or refusal of visas. 8 U.S.C. 1104(a).

Under the clear wording of the Immigration and Nationality Act, the issuance of an immigrant visa, or even a nonimmigrant visa, is a matter vested solely in the discretion of the appropriate consular officer.[4] Pursuant to 8 U.S.C. 1201(a) "a consular officer may issue (1) to an immigrant who has made proper application therefor, an immigrant visa which . . . . . shall specify . . . . . the preference, nonpreference, immediate relative, or special immigration classification to which the alien is charged." Subsection (g) of the same section specifies that no visa or other document shall be issued to an alien if it appears to the consular officer from the application or papers submitted by the alien that he is ineligible to

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[4] The appellant for the first time in this litigation, implies that the Administrative Procedure Act provides a basis for jurisdiction. This court has not held that the APA provides an independent grant of jurisdiction.

Moreover, Section 706 (cited by the appellant) does not apply to agency action committed to agency discretion by law. Title 5 U.S.C. § 701(a)(2). The instant consular action is committed to agency discretion by law. Title 8, U.S.C. §§ 1201, *et seq.* In addition, the appellant misreads the cited portions of 22 C.F.R. 42.130(c) to the extent that he alleges that all issues of law must be decided by the State Department. The Regulations leave review to the discretion of the Department and the Department law opinions are binding in the event of a conflict. 22 C.F.R. 42.130(c). The appellant has not alleged such a conflict. In any event, this Court has held that such consular actions are unreviewable. *deGomez* v. *Kissinger*, 534 F.2d 518 (2d Cir. 1976), *certiorari denied*, No. 76-5043, October 18, 1976.

Additionally, the appellant has raised facts (as to who made certain consular decisions) that plaintiff did not deem material at the time of the cross-motions for summary judgment. (A-18, 22, 23). Therefore, factual issues are waived. Rule 9(g), General Rules of the Eastern District of New York.

receive a visa or other documentation, or if the consular officer knows or has reason to believe that the alien is ineligible to receive a visa or other documentation. The burden of proof is on the alien applicant to establish, to the satisfaction of the consular officer, that he is entitled to the status claimed and that he is not subject to any of the exclusionary provisions contained in the Act. 8 U.S.C. § 1331.

Since Congress has specifically vested the consuls with exclusive power to grant or deny a visa, such determinations have consistently been held to be exempt from either administrative or judicial review. *Kleindienst* v. *Mandel*, 408 U.S. 753 (1972); *Loza-Bedoya* v. *Immigration and Naturalization Service*, 410 F.2d 343 (9th Cir. 1969); *United States ex rel. Ulrich* v. *Kellogg*, 30 F.2d 984 (D.C. Cir. 1929), *cert. denied; United States ex rel. Ulrich* v. *Stimson*, 279 U.S. 868 (1929); *Licea-Gomez* v. *Pilliod*, 193 F. Supp. 577 (N.D. Ill. 1960). "Whether the consul has acted reasonably or unreasonably is not for us to determine. Unjustifiable refusal to visé a passport may be ground for diplomatic complaint by the nation whose subject has been discriminated against. See 3 Moore's Digest 996. It is beyond the jurisdiction of the court." *United States ex rel. London* v. *Phelps*, 22 F.2d 288, 290 (2d Cir. 1927), *cert. denied*, 276 U.S. 630 (1928).

In the *Ulrich* case, *supra*, an appeal from the dismissal of a mandamus action brought to compel the Secretary of State to direct the consul in Berlin to issue a visa, the Court of Appeals for the District of Colombia affirmed the dismissal, stating:

> We are not able to find any provision of the immigration laws which provides for an official review of the action of the consular officers in such a case by a cabinet officer or other authority. *Id.* at 986.

This unreviewable power of the consular officer to grant or deny a visa has withstood various constitutional attacks. As the Supreme Court stated in *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 542-43 (1950):

> Thus the decision to admit or exclude an alien may be lawfully placed with the President who may in turn delegate the carrying out of this function to a responsible executive officer of the sovereign such as the Attorney General. The action of the executive officer under such authority is final and conclusive. Whatever the rule may be concerning deportation of persons who have gained entry into the United States, it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien.

See also *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 210-15 (1953); *Polymeris* v. *Trudell*, 284 U.S. 263 (1932); *Fong Ting* v. *United States*, 149 U.S. 698 (1893); *Petition of Joe Cahill*, 447 F.2d 1343 (2d Cir. 1971).

In *Mandel* v. *Mitchell*, 325 F. Supp. 620 (E.D.N.Y. 1971), Judge Bartels, dissenting from the decision rendered by his brethren on the three-judge District Court impanelled to hear the attack upon the denial of a visa by an American consul abroad, grounded on the allegation that the sovereign power to exclude aliens must bow when it interferes with rights secured under the First Amendment, argued that the consul's determination was beyond judicial interference:

> While an alien who has entered this country may be expelled only after procedural due process, an alien on the threshold of initial entry stands on an

> entirely different footing * * *. The requirement that aliens secure a visa from an American Consul abroad was first adopted as a security measure in 1917.
>
> Since that time statutory enactments, administrative interpretations and court decisions have uniformly held that the exercise of the Counsul's determination was beyond judicial interference.
>
> In the area of alien exclusion the case for non-judicial review is particularly strong. Flexibility must be granted to the Consul under all sections of the Act in order to adapt the Congressional policy to the variable conditions with which the Consul is from time to time confronted. Frequently his decision to deny a visa is predicated upon confidential information, the disclosure of the sources of which might endanger the public security and in some cases might seriously adversely affect our foreign relations. *Id.* at 647-648.

Thereafter, in *Kleindienst* v. *Mandel*, *supra*, the Supreme Court reversed the three-judge panel and, in so doing, reaffirmed, as argued in the dissent below, that Congress not only has absolute power to adopt a policy excluding aliens, but also can and has extended such power to having that policy enforced exclusively through consular officers without judicial interference. *See generally* C. Gordon & H. Rosenfield, *Immigration Law and Procedure* §§ 1.3b, 3.8a & 3.8b (rev. ed. 1975).

Plaintiff's reliance upon *Fiallo* v. *Levi*, *supra*, to show that jurisdiction is conferred upon this Court is misapplied. *Fiallo* involved solely a constitutional challenge of the two classifications of aliens established by Congress—*viz.*, the differentiation in excluding unwed

biological fathers and not unwed biological mothers—resulting in restrictive numerical quotas and labor certification requirements which are waived for those individuals who "qualify" as parents or children within the meaning of the Immigration and Nationality Act, 8 U.S.C. § 1101(b)(1)(C), (2). The *Fiallo* Court stated that "[s]ubject matter jurisdiction is conferred on this Court by section 279 of the Act, Title 8 U.S.C. § 1329." *Id.* at 165. This conferral, however, relates to the determination of the constitutionality of the Act's bi-classification system, not to jurisdiction to review consular action. Indeed, the Court recognized that consular decisions granting or denying visas are immune from judicial review. *Id.* at 165. The troublesome part of the Court's opinion, however, is the following dicta:

> We note, however, that the petition in question here *did not constitute an application for a visa,* but was a preliminary declaration of immigrant status. We will not extend consular non-reviewability, insofar as that rule has been recognized, beyond the actual grant or denial of a visa. *Id.* at 165 (emphasis added).

In the instant litigation, Martin Grullon's preliminary petition was for a visa, which the Consul denied. The *reason* for the denial was grounded in the Consul's determination that his son was illegitimate, thus Martin was not entitled to the waiver of labor certification. It is submitted that when the *Fiallo* Court stated that the petition before it was for a "preliminary declaration of immigrant status," and not for the "application of a visa," the Court was referring to the constitutionality of that *status* upon which issue it had subject matter jurisdiction

and not to a Consul's *reason* for denying a visa, as is present in this case.[5]

Assuming, however, that *Fiallo* stands for the broad proposition that consular determination of immigrant status is subject to judicial review, such an interpretation can no longer be considered the applicable rule of law in light of the recent holding of the Second Circuit in *de-Gomez* v. *Kissinger*, *supra*. There, plaintiff sought a *declaration* that her marriage was valid [a status determination] and an order enjoining the Consul from denying her immigrant spouse's application for a visa on the basis of the invalidity of that marriage. The District Court granted the Government's motion for summary judgment and dismissed the action stating that it lacked jurisdiction. On appeal, plaintiff argued that the District Court had jurisdiction under 8 U.S.C. § 1329. The Second Circuit held that the decision of the Supreme Court in *Klendienst* v. *Mandel*, *supra*, and of its own circuit in *Burrafato* v. *United States*, 523 F.2d 554 (2d Cir. 1975), *cert. denied*, 423 U.S. 920 (1976), "preclude any judicial review of the consular decision not to issue a visa. . . . *We reject the argument*

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[5] The District Court below, at A-27, reasoned:

> Furthermore, the Court has considerable doubt as to the validity of the distinction drawn by the Court in *Fiallo*. That Court's "reluctance to insulate entirely the action of any public official from judicial scrutiny" is shared by this Court and, indeed, by practically every Court which has considered the immunity apparently granted to consular officials from review of their visa denials. Nevertheless, the status which plaintiff seeks to have declared is the key element in whether his father's visa should or should not be granted. Moreover, the visa for which plaintiff claims to seek a "preliminary" declaration of status, has already been denied on the basis of the consul's own determination of status. No independent reason for determining that status has been offered.

that section 279 [8 U.S.C. § 1329] *authorizes the sort of judicial interference* in the *visa-issuing process* sought by plaintiff." Id. at 519 (emphasis added).

In reaching this decision, the Court specifically stated that it agreed with the reasoning and result reached by the District Court in *dePena* v. *Kissinger*, 409 F. Supp. 1182 (S.D.N.Y., 1976). *See deGomez, supra*, at 519. In that case, plaintiff, a lawful permanent resident of the United States, sued for a declaratory judgment that her marriage to a Dominican Republic citizen was a valid one. The Court explicitly addressed itself to the question of whether or not it had jurisdiction if review was sought involving *only* the Consul's decision concerning the *bona fides* of the marriage, *and not the visa denial.* Answering in the negative, the Court stated:

> Such a characterization would be disingenuous, however, *since the status of the marriage is merely an element* in . . . [the] eligibility for a visa. The Consul's determination regarding the marriage is the "facially legitimate and bona fide reason" which is the basis for the discretionary decision on the visa application; as such, *Mandel* interdicts Court examination of the Consul's determination (emphasis added).

The conclusion is inescapable; whether or not the acknowledgment of Martin Grullon's illegitimate child was sufficient to constitute legitimation and confer on him the status of "child" within the meaning of Section 101(b)(1)(c) of the Immigration and Nationality Act, 8 U.S.C. 1101(b)(1)(c), is immaterial, for it was beyond the jurisdiction of the District Court to review the denial of a visa by a Consular official abroad.

CONCLUSION

The order of the District Court should be affirmed.

Dated: December 13, 1976

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York,
225 Cadman Plaza East,
Brooklyn, New York 11201.

BERNARD J. FRIED,
LEWIS F. TESSER,
Assistant United States Attorneys,
Of Counsel.

ADDENDUM TO APPELLEES' BRIEF

Relevant Statutes

Section 101(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1101(b)(1)(C)

> (b) As used in subchapters I and II of this chapter—
>
> (1) The term "child" means an unmarried person under twenty-one years of age who is—
>
> * * * * *
>
> (C) a child legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile, whether in or outside the United States, if such legitimation takes place before the child reaches the age of eighteen years and the child is in the legal custody of the legitimating parent or parents at the time of such legitimation.

Section 212(a)(14), 8 U.S.C. § 1182(a)(14):

> (14) Aliens seeking to enter the United States, for the purpose of performing skilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of application for a visa and admission to the United States and at the place to which the alien is destined to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed. The exclusion of aliens under this paragraph shall apply to

special immigrants defined in Section 1101(a)(27)(A) of this title (other than the parents, spouses, or children of United States citizens or of aliens lawfully admitted to the United States for permanent residence), to preference immigrant aliens described in Sections 1153(a)(3) and 1153(a)(6) of this title, and to non-preference immigrant aliens described in Section 1153(a)(8) of this title;

Section 101(a)(27)(A), 8 U.S.C. § 1101(a)(27)(A):

(27) The term "special immigrant" means—

(A) an immigrant who was born in any independent foreign country of the Western Hemisphere or in the Canal Zone and the spouse and children of any such immigrant, if accompanying, or following to join him: *Provided*, that no immigrant visa shall be issued pursuant to this clause until the Consular Officer is in receipt of a determination made by the Secretary of Labor pursuant to the provisions of Section 1182(a)(14) of this title.

★ U. S. Government Printing Office 1976—714—018—AENY—26

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

EVELYN COHEN, being duly sworn, says that on the 13th day of December, 1976, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a BRIEF FOR APPELLEE

of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Antonio C. Martinez, Esq.
324 W. 14th Street
New York, N.Y. 10014

Evelyn Cohen

Sworn to before me this
13th day of Dec. 1976

Carolyn N. Johnson

CAROLYN N. JOHNSON
NOTARY PUBLIC, State of New York
No. 41-4618298
Qualified in Queens County
Term Expires March 30, 1977